IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2030 OF 2003

Prabha D. Kannan,
Dy. Manager (IFS), Emp.No.304221,
122, Shantivan, Oshiwara,
Andheri (West),
Mumbai 400 053. ... ... Petitioner

Versus

1. Indian Airlines Ltd.,
having its address at Santacruz Airport,
Vile Parle (E),
Mumbai 400 099.

2. S.K. Ghorai,
Regional Director,
Indian Airlines, Santacruz Airport,
Vile Parle (E),
Mumbai 400 099. ... ... Respondents

Mr.J.P. Cama, Senior Advocate with Mr.C.U.Balsara i/by M/s.Goenka Law Associates for petitioner.

Mr.S.K.Talsania with Mr.K.B.Swamy, Ms.Chhaya Shah, Mr.V.M.Parkar and Ms.Pooja Kulkarni i/by M/s.Bhasin & Co. for respondents.

CORAM : H.L. GOKHALE &
S.C.DHARMADHIKARI, JJ.

DATE OF RESERVATION OF JUDGMENT : 1st July 2005

DATE OF PRONOUNCEMENT OF JUDGMENT:30th August 2005

JUDGMENT : (Per H.L.Gokhale, J.)

1. This Writ Petition by a former Deputy Manager (In Flight Services) of the 1st respondent-Indian Airlines Ltd. seeks to challenge her termination from service without any enquiry by an order dated 9th August 2002 passed by 1st respondent by invoking Regulation 13 of

their service regulations. The challenge to the order of termination is principally on two grounds viz. (a) that the concerned service regulations could not be invoked at the relevant time since they had lapsed and (b) assuming that they could be relied upon, Regulation 13 therefrom which was sought to be invoked, was clearly devoid of principles of natural justice and hence, was violative of Article 14 of the Constitution of India.

2. Brief facts leading to the present Petition are as follows:-

. The petitioner, who joined the services of the 1st respondent-Indian Airlines initially as an Airhostess on 28th September 1977, was promoted from time to time and at the relevant time, was working as the Deputy Manager (In Flight Services) in the executive cadre. On 18th June 2002, she was operating on Flight IC 617 from Mumbai to Hyderabad. The petitioner’s luggage consisted of a hard top green colour delsey bag and a shoulder purse. After the Flight reached Hyderabad from Mumbai, the Flight was to go to Sharjah via Bangalore as Flight No.IC 961. When all the passengers including the crew had boarded the

Flight to Bangalore and when the Flight was about to take off, the plane was stopped and the petitioner was made to disembark by the Personnel of Central Industrial Security Force (CISF). The petitioner was brought back to the Hyderabad Airport where she was shown one green colour hard top delsey bag and was asked as to whether that was her bag, which she admitted of having left behind. When the bag was opened, it was found to contain the cash of Rs.22 Lakhs. Thereafter she was arrested by the Customs Authorities for carrying these unexplained currency notes worth Rs.22 Lakhs. When the Customs Authorities made an enquiry, she initially made a statement under Section 108 of the Customs Act admitting her offence in carrying the currency notes. She remained in custody thereafter until 3rd July 2002. Her husband was also arrested on the allegations of being involved in the transaction. On being released, she retracted the statement made by her earlier. She wanted to join back on duty but the Board of Directors of the 1st respondent-Indian Airlines was of the opinion that her continuance in the service was a grave security risk and was detrimental to the interest of the Company. The Company had lost confidence in her and, therefore, her services were

terminated by the impugned order dated 9th August 2002. This order reads as follows:-

" Date : 09.08.2002

This is to inform you that the Board of Directors of Indian Airlines Ltd. has decided to terminate your services with immediate effect under Regulation 13 of Service Regulations applicable to you. Accordingly, your services stand terminated with immediate effect from 9.8.2002. Though you are not entitled to any notice or salary in lieu thereof in terms of Regulation 13, however, a cheque No.354551 dated 9.8.2002 for Rs.21,734/- is enclosed.

The Finance Department has been advised to settle your accounts immediately.

Sd/-

(S.K. Ghorai)

Regional Director "

3. It is this order of termination which is

challenged through this Writ Petition. This Petition is affirmed on 10th June 2003. The Petition was admitted on 7th October 2003. The respondents have filed their reply to oppose the Petition. It is material to note that after the termination of her services, the petitioner was paid her terminal dues consisting of provident fund of about Rs.12,74,000/- and gratuity of about Rs.2,22,000/-. The petitioner having challenged the order of termination, has returned this amount to the respondents on or about 15th August 2002.

4. Since the respondents terminated the petitioner's services by invoking Regulation 13, it is material to note that the same is framed under Section 45(2)(b) of the Air Corporations Act, 1953 which has been since repealed under Section 11 of the Air Corporations (Transfer of Undertakings and Repeal) Act, 1994. This second Act came into force from 29.1.1994. The relevant service **Regulation 13(a)** reads as follows:-

> " 13 (a) The services of an employee may be terminated without assigning any reason to him / her and without any prior notice but only on the following grounds not

amounting to misconduct under the Standing Orders, namely:

(i) If he/she is, in the opinion of the Corporation (now Company) (the Board of Directors of Indian Airlines) incompetent and unsuitable for continued employment with the company and such incompetence and unsuitability is such as to make his / her continuance in employment detrimental to the interest of the company.

OR

If his/her continuance in employment constitutes, in the opinion of the Corporation (now Company) (the Board of Directors of Indian Airlines), a grave security risk making his/her continuance in service detrimental to the interests of the Corporation (now Company).

OR

If in the opinion of the Corporation (now Company) (Board of Directors of Indian Airlines) there is such a justifiable lack

> of confidence which having regard to the nature of duties performed, would make it necessary in the interest of the Corporation (now Company) to immediately terminate his / her services. "

5. As stated above, the first submission of the petitioner has been that in view of the repeal of the Air Corporations Act, 1953, the regulations thereunder did not survive and could not be invoked by the respondents. The petitioner relied upon a judgment of the Apex Court in the case of **Air India vs. Union of India & ors.** reported in **(1995) 4 Supreme Court Cases 734** in her support. It was pointed out that in paragraph 8 of that judgment, the Apex Court has in terms held that if subordinate legislation was to survive the repeal of the parent statute, the repealing statute must say so in so many words. Inasmuch as there is no such specific provision, the said regulations ceased to be effective on 29.1.1994. The respondents, on the other hand, relied upon Section 8(1) of the 1994 Act which reads as follows:-

> " 8. Provisions in respect of officers and other employees of corporations--

(1) Every officer or other employee of a corporation (except a Director of the Board, Chairman, Managing Director or any other person entitled to manage the whole or a substantial part of the business and affairs of the corporation) serving in its employment immediately before the appointed day shall, in so far as such officer or other employee is employed in connection with the undertaking which has vested in a company by virtue of this Act, become, as from the appointed day, an officer or other employee, as the case may be, of the company in which the undertaking has vested and **shall hold his office or service therein by the same tenure, at the same remuneration, upon the same terms and conditions, with the same obligations** and with the same rights and privileges as to leave, passage, insurance, superannuation, provident fund, other funds, retirement, pension, gratuity and other benefits as he would have held under the corporation if its undertaking had not vested in the company and shall continue to do so as an officer or other

> employee, as the case may be, of the company or until the expiry of a period of six month from the appointed day if such officer or other employee opts not to be the officer or other employee of the company, within such period. "
>
> (Emphasis supplied)

It was, therefore, submitted on behalf of the respondents that as far as the officers and the employees of the respondents were concerned, their services continued to be on the same terms and conditions and with the same obligations. Therefore, although the principal Act was repealed, the provisions under the regulations could certainly be invoked.

6. It is material to note in this behalf that the Appeal to the Apex Court in that matter arose from the judgment of a Division Bench of the Delhi High Court (Per Kirpal, J. as he then was in that Court) in the case of **Air India vs. Union of India & ors. reported in 1991 Labour and Industrial Cases page 451**. The Deputy Chief Labour Commissioner, Delhi had framed the standing orders for the employees who came in the category of workmen. The standing orders were framed under

the provisions of Industrial Employment (Standing Orders) Act, 1946. Air India had challenged the applicability of this Act in the said Writ Petition. The Division Bench in terms held that the Air Corporations Act would not be said to be a special Act and could not be regarded as obliterating the applicability of the Industrial Employment (Standing Orders) Act. The Petition filed by the Air India was, therefore, dismissed. This judgment was rendered on 27th August 1990. An Appeal therefrom was carried to the Apex Court and it came to be decided on 18th July 1995. This judgment has been reported as stated above in **(1995) 4 SCC 734 (Air India vs. Union of India & ors)**. By the time, this Appeal came to be decided, the Air Corporations Act, 1953 had come to be repealed and the new Act had come into force on 29.1.1994. One of the objections raised by the Counsel appearing for the Air India employees was that the Act having now been repealed, the regulations no longer survived. It is in this context that the above referred observations were made in paragraph 8, namely, that unless the Repealing Statute specifically stated so, the subordinate legislation did not survive. Therefore, in paragraph 10, the Court held that the regulations ceased to be effective from

7. However, what is stated by the Apex Court in para-9 (of S.C.C.) of its judgment is relevant for our purpose. This para-9 reads as follows:-

> " 9. Section 8 of the 1994 Act does not in express terms save the said Regulations, nor does it mention them. **Section 8 only protects the remuneration, terms and conditions and rights and privileges of those who were in Air India's employment when the 1994 Act came into force.** Such saving is undoubtedly "to quieten doubts" of those Air India employees who were then in service. What is enacted in Section 8 does not cover those employees who joined Air India's service after the 1994 Act came into force. **The limited saving** enacted in Section 8 does not, in our opinion, extend to the said Regulations. "
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> (Emphasis supplied)

Thus, the position is clear, namely, that although the regulations ceased to be effective on 29th January 1994, Section 8 did protect the terms and

conditions, the obligations and the rights and privileges of those who were in Air India's employment and they continued to remain the same. As observed by the Apex Court in para-9, it was "to quieten doubts" of the employees then in service. The petitioner was undoubtedly in service at that time and had received her promotions under the Service Regulations and at the time of the impugned order she belonged to the executive cadre. She continued to avail of the benefits under the Service Regulations and her obligations thereunder also continued to be the same as also the terms and conditions of her service. The service regulations of Air India and Indian Airlines are identical. This being the position, it could not be said that it was impermissible for the respondents to invoke regulation 13(a) only because the Air Corporations Act, 1953 had been repealed.

8. The second submission of the petitioner has been that the above-referred regulation is ultra vires Article 14 of the Constitution of India inasmuch as the 1st respondent being a statutory Corporation is an Authority which must observe the principles of fair play and justice in its functions vis-a-vis the employees as well. No

enquiry has been held against the petitioner to prove any of the allegations against her. She had no opportunity to defend herself against the allegations made against her. The opportunity was denied with respect to establishing of the allegations and also with respect to the punishment. No opportunity was afforded to her to make any representation either before the impugned decision or thereafter, and hence, the decision was violative of the principles of natural justice.

9. Mr.Cama, learned Counsel appearing for the petitioner, firstly, relied upon a judgment of a learned Single Judge of this Court (P.B. Sawant, J. as he then was in this Court) in the case of **S.S. Muley vs. J.R.D. Tata reported in 1980 Labour and Industrial Cases page 11**. The relevant Regulation 48(a) provided as follows:-

> " 48. Termination :
>
> The services of an employee may be terminated without assigning any reason, as under:-
>
> (a) of a permanent employee by giving him

30 days' notice in writing or pay in lieu of notice;

(b) . . . . . .

(c) . . . . . "

The petitioner in that case was a Purchase Manager in Air India and his services were terminated by invoking the said regulation without any enquiry. The learned Single Judge held that the said regulation was void for infringing Article 14 of the Constitution of India. The learned Judge reached his conclusion for the reason that there was no guidance given any where in the impugned regulation for the exercise of the power conferred by it, that it placed untrammelled power in the hands of the Authorities, that it was an arbitrary power which was conferred and that it did not make any difference whether it was to be exercised by high ranking officials. In **West Bengal State Electricity Board & ors. vs. Desh Bandhu Ghosh & ors. reported in (1985) 3 SCC page 116**, the Apex Court agreed with this reasoning and conclusion in para-4 thereof. In the submission of Mr.Cama, the same principles will have to be applied to the present regulation.

10. **Central Inland Water Transport Corporation Limited & anr. vs. Brojo Nath Ganguly & anr. reported in (1986) 3 Supreme Court Cases page 156**, the Apex Court was concerned with Rule 9 of the Corporation's Service, Discipline and Appeal Rules, 1979. Sub-rule (i) thereof provided that the employment of a permanent employee shall be subject to termination of three months' notice on either side. Sub-rule (ii) thereof provided that the services of a permanent employee can be terminated on the grounds of services no longer being required in the interest of the Company without assigning any reasons. In para-98 of the judgment, the Apex Court held that Rule 9(i) can aptly be called "the Henry VIII clause" since it conferred an absolute, arbitrary and unguided power upon the Corporation. In paragraphs 108 and 109 of the judgment, it referred to the judgment in S.S. Muley's case (supra) and approved the view taken therein. In another judgment in the case of **Manohar P. Kharkhar vs. Raghuraj reported in (1981) 2 LLJ 459**, a Division Bench of the Bombay High Court had taken the exactly contrary view with respect to the very Regulation 48. The Apex Court held that Kharkhar's case (supra) was wrongly decided. It held that Rule

9(i) in the case before it, did not provide for a hearing or holding of an enquiry and, therefore, the same was ultra vires Article 14 of the Constitution of India. It further held that the said clause was contrary to Section 23 of the Contract Act for being opposed to public policy.

11. The third judgment relied upon by Mr.Cama was in the case of **Delhi Transport Corporation vs. D.T.C. Mazdoor Congress & ors. reported in 1991 Supp (1) Supreme Court Cases 600**. Regulation 9(b) of Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations was under challenge in that matter. It provided for termination due to reduction of establishment or in the circumstances other than those mentioned in Regulation 9(a) by one month's notice. (Regulation 9(a) provided for termination on completion of probation, misconduct or on completion of specific period or contract). The Apex Court, by majority judgment, held the said regulation to be arbitrary, unfair and offending Article 14 of the Constitution amongst others.

12. Mr.Cama then relied upon other judgments to submit that hearing and compliance of natural justice was must in proceedings concerning the

actions against the employees. Thus, he relied upon a judgment in the case of **D.K. Yadav vs. J.M.A. Industries Ltd. reported in (1993) 3 Supreme Court Cases 259** where the Apex Court held that the principles of natural must be read into the Standing Orders concerned. Similar is the view in the case of **Basudeo Tiwary vs. Sido Kanhu University & ors. reported in (1998) 8 SCC 194** where the Court held that in the sphere of public employment it was well settled that an action by the employer against an employee must be fair, just and reasonable and notice and hearing are essential components thereof. Mr.Cama thereafter relied upon a judgment in the case of **Uptron India Ltd. vs. Shammi Bhan & anr. reported in (1998) 6 Supreme Court Cases 538** where the Apex Court held that the principles of natural justice had to be read into the relevant Standing Orders.

13. Mr.Talsania, learned Counsel appearing for the respondents, rebutted these arguments by submitting that the regulation involved in the present case was quite different from the regulations which were concerned in the earlier mentioned cases of **S.S. Muley (supra), Air India (supra), Central Inland Water Transport Corporation (supra) and Delhi Transport**

Corporation (supra). All of them provided for a simple termination by giving a notice of a specified period of one month or three months or pay in lieu thereof at the highest. There was no guidance given any where in the impugned regulation as to when power conferred by it was to be exercised. The present regulation provided for the circumstances wherein the action could be taken. In his submission, that made a difference. He submitted that in the case of S.S. Muley (supra), the learned Single Judge had held Regulation 48(a) as arbitrary for absence of any guidelines (para-28 of the judgment). With respect to the necessity of such guidelines, the learned Judge observed in para-11 as follows:-

> " It is difficult to see as to how and in what circumstances the power to terminate an employee’s service without laying down even a bare guideline of the conditions under which it can be exercised, can be justified. An employee’s service can be terminated only for some reason which has relation to or a bearing upon his employment, and not for no reason whatsoever. These reasons may be divided into two categories, one consisting of

misconducts enumerated in the service regulations and the other of reasons which do not amount to misconduct such as where it is in the public interest or in the interests of administration that it is necessary to terminate the services of an employee. The later category may include various situations such as loss of confidence, unsuitability etc. The misconduct in their turn may be of three types, first where an enquiry can be held, second where an enquiry is unnecessary and the last where for some valid reasons it is not feasible to hold an enquiry or it is not in the public interests or in the interests of administration to hold it. It is not necessary to consider cases falling under the first category, or obviously in such cases the impugned regulation will not come into play. As regards the second category, there are cases where the misconduct of the employee is already proved such as where he has admitted the misconduct or where he has been convicted by a competent Court of law and there is no need to hold a further departmental enquiry. Here again, the

impugned regulation will have no application. It is argued that it is while dealing with the third class of cases of misconduct and the second category of the reasons that an employer requires such powers as are vested by the impugned regulation. This argument, however, ignores that this need does not explain the absence of indication of the circumstances under which alone the power can be exercised. If the power under the impugned regulation is intended to be exercised only in such circumstances, there is nothing to prevent the regulation from saying so. The impugned regulation, as in stands today, however fails to qualify the exercise of the power conferred by it even by such broad conditions. "

14. Then coming to the question as to what could be these guidelines which would take away the vice of arbitrariness, the learned Judge gave some indications in para-12 of the judgment. This para-12 reads as follows:-

" 12. As is evidenced by Article 311 of

the Constitution which provides for the dismissal, removal or reduction in rank of a Government servant, even the Constitution envisages circumstances when it may not be possible to hold an enquiry before an action against a government servant is taken. These circumstances mentioned in Clause (b) and (c) of the second proviso to Clause (2) of the said Article, broadly stated, are (i) where it is not reasonably practical to hold an enquiry or (ii) where it is not expedient to hold such enquiry in the interest of the security of the State. Thus, even in a case of the termination of the services of a Government servant, it is possible to lay down in broad terms the circumstances under which alone an enquiry may be dispensed with. There is no reason why even such broad guidelines cannot be incorporated in the impugned regulation. In the absence of any guidelines whatsoever the arbitrary use of the extraordinary power is writ large upon the impugned regulation. The present is a case where there is a total absence of guidelines. "

15. Mr.Talsania pointed out that in his separate but concurring judgment in the Supreme Court, Justice P.B. Sawant has reiterated the same approach in Delhi Transport Corporation vs. D.T.C. Mazdoor Congress (supra). At the end of para-256 of the Report in SCC beginning on page 730, the learned Judge has observed as follows:-

> " The appellants suggest firstly that we should read into the regulation a provision that the concerned employee would be given a hearing. The suggestion itself begs the question : Hearing for what? Is he to be heard with regard to his misconduct? If so, it will require that he should first be intimated of the misconduct of which he is guilty. But that kind of a situation is taken care of by clause (a) of the said regulation. There is, therefore, no need of a separate provision for the same. If, on the other hand, the services of an employee are to be terminated on grounds other than those mentioned in clause (a), then, those grounds being unknown to the employee, cannot be met by him even if he is given a

hearing. The reading in the rule of a mere provision of a hearing is, therefore, meaningless. The other suggestion made on behalf of the appellants is still more objectionable. The suggestion was that we should read in the rule all circumstances where it is not possible or necessary to hold an enquiry. I thought that such situations are capable of being formulated easily and conveniently at least in general terms as is done by the Constitution-makers in the second proviso to Article 311(2). In fact, one of the public undertakings, viz., Indian Airlines has come out with such regulation being amended Regulation 13 of its Employees' Service Regulations, and the same has been placed on record by them. What is necessary to note in this connection is that the reading of such circumstances in the existing regulation would require its extensive recasting which is impermissible for the court to do. I know of no authority which supports such wide reading down of any provision of the statute or rule/regulation. For all these reasons the doctrine of reading down is according

to me singularly inapplicable to the present case and the arguments in support of the same have to be rejected. "

16. It can be seen that the second proviso to Article 311(2) permitted dispensing with an enquiry or giving a notice even where a civil servant was removed, dismissed or reduced in rank in three circumstances viz. (a) where the action was for his conviction on a criminal charge, (b) where the Authority was satisfied for reasons to be recorded in writing that it was not reasonably practicable to hold an enquiry and (c) where the President or Governor was satisfied that in the interest of security of State, it was not expedient to hold the enquiry. Mr.Talsania submitted that the three categories in Regulation 13(a) of the present Regulations were comparable with Article 311(2) and pointed out that during the hearing of the Delhi Transport Corporation's case (supra), Indian Airlines had come out with such regulation being this very Regulation 13 and was placed it on record before the Court. This is specifically referred in the above-mentioned last part of para-256 of the judgment of P.B. Sawant, J. He, therefore, submitted that the regulation could not be said to be arbitrary for want of

guidelines and, therefore, if notice and hearing were dispensed with in such a situation, that could not be faulted.

17.(i) Mr.Talsania submitted that the present Regulation 13 contains guidelines as to when it is to be invoked as pointed out above, and it would always be open for the Court in exercise of its jurisdiction of judicial review to examine in a given case whether the parameters are met or whether there is arbitrary exercise of powers. In the present case, the view of the Board of Directors was that it was detrimental to continue her in the interest of the Company, it was a grave security risk to continue the petitioner in service and that the Company had lost confidence. These grounds were available under the three sub-clauses and, therefore, the termination was explained. He further submitted that on facts when an employee was carrying such a huge amount, it would definitely cause a security risk. There was no proper explanation for that amount and this would definitely shake the confidence of the Management in such an employee. The reputation of the Airlines was at stake and the Company can certainly say that her continuance is detrimental to its interest. The Court can certainly examine

this submission which is now permissible in view of these guidelines.

(ii). He then submitted that the guidelines protected against misuse of powers since the decision was to be taken not by an individual officer but by the Board of Directors. This power is to be exercised only on the grounds which are provided in the regulation but the same was not for any misconduct. He submitted that the power has been exercised bona fide. This is a power to terminate the services under circumstances other than the misconduct. Such power has got to be upheld for the circumstances which justify such an action.

18. Mr.Cama, learned Counsel appearing for the petitioner, countered these submissions by pointing out that at no point of time the petitioner had any opportunity before the respondents. He submitted that they have proceeded entirely on the basis of the statement made by the petitioner before the Customs Authorities which she subsequently retracted. Merely because the high authority viz. the Board of Directors had exercised the power cannot protect an employee from a wrong decision. He

pointed out that P.B.Sawant, J. in his judgment in the case of **Delhi Transport Corporation (supra)** has observed in para-236 of SCC that beyond the self-deluding and self-asserting righteous presumption, there is no justification to the theory of high authority taking the correct decision. This para-236 reads as follows:-

> " 236. The "high authority" theory so-called has already been adverted to earlier. Beyond the self-deluding and self-asserting righteous presumption, there is nothing to support it. This theory undoubtedly weighed with some authorities for some time in the past. But its unrealistic pretensions were soon noticed and it was buried without even so much as an ode to it. Even while Shah, J. in his dissenting opinion in **Moti Ram Deka vs. General Manager, N.E.F. Railways** had given vent to it, Das Gupta, J. in his concurring judgment but dealing with the same point of unguided provisions of Rule 148(3) of the Railway Establishment Code, had not supported that view and had struck down the rule as being violative of Article 14 of the Constitution. The

majority did not deal with this point at all and struck down the rule as being void on account of the discrimination it introduced between railway servants and other government servants."

19. We have given our anxious consideration to the submissions of both the sides. It is true that in S.S. Muley's case (supra) as also in the Delhi Transport Corporation's case (supra), the learned Single Judge (P.B.Sawant, J.) has observed that the provisions similar to Article 311(2) could provide appropriate guidelines for cases where action is required without holding an enquiry. The fact, however, remains that if we compare the three situations provided in the exception under Article 311(2) with those under the present regulations, the provisions are quite different. The first exception in Article 311(2) is based upon a conviction in a criminal case. The third case is on the basis of security of State and the second exception is where it is reasonably not practicable to hold the enquiry and that is recorded in writing by the Authority. What we find in the present case are provisions which are different. Here none of the circumstances are based on any conviction nor is

there any case of security of State, though there is a ground of grave security risk. The other two grounds are being detrimental to the interest of the Company and lack of confidence. Obviously, these grounds are different. The only ground comparable with Article 311(2) is grave security risk.

20. Besides, it is to be noted that even in cases under Article 311(2) the law has been clarified by the Apex Court in the case of **Union of India vs. Tulsiram Patel reported in (1985) 3 SCC 398 = AIR 1985 SC 1416**. The Constitution 42nd Amendment Act, 1976 amended clause (2) of Article 311. It came up for consideration before the Apex Court in Tulsiram Patel's case (supra). The second proviso to Article 311(2) lays down that there shall not be need of any enquiry or giving any notice where a person is dismissed, removed or reduced in rank (i) on the ground of a criminal conviction, or (ii) where it is not practicably reasonable to hold an enquiry, or (iii) where in the interest of security of State, it is not expedient to hold an enquiry. These three exceptions came for authoritative pronouncement in Tulsiram Patel's case where a large number of petitions and appeals of large number of persons

concerning the application of different clauses of the second proviso to Article 311(2) were involved. The Court considered the relevant provisions of Central Civil Services (Classification, Control and Appeal) Rules, Railway Servants Rules and Central Industrial Security Force Rules in that matter. The Apex Court disagreed with the view taken in **Divisional Personnel Officer v. T.A. Challappan - AIR 1975 SC 2216,** which had laid down that a rule framed under Article 309 could require observance of a procedure expressly excluded by the second proviso to Article 311(2). In Tulsiram Patel, the Court held that the restriction on the doctrine of pleasure expressly removed by the Constitution could not be re-introduced through an Act or Rules. It however clarified that the second proviso is of exceptional nature and before availing it, the conditions specified therein must be strictly satisfied.

21. Therefore, came the question as to whether a Government servant was now without any remedy and, in that context, the Court observed in para 102 of AIR as follows:-

"102. In this connection, it must be

remembered that a government servant is not wholly without any opportunity. Rules made under the proviso to Article 309 or under Acts referable to that Article generally provide for a right of appeal except in those cases where the order of dismissal, removal or reduction in rank is passed by the President or the Governor of a State because they being the highest Constitutional functionaries, there can be no higher authority to which an appeal can lie from an order passed by one of them. Thus, where the second proviso applies, though there is no prior opportunity to a government servant to defend himself against the charges made against him, he has the opportunity to show in an appeal filed by him that the charges made against him are not true. This would be a sufficient compliance with the requirements of natural justice. In Maneka Gandhi's case (AIR 1978 SC 597) and in Liberty Oil Mills v. Union of India (1984) 3 SCC 465 : (AIR 1984 SC 1271), the right to make a representation after an action was taken was held to be a sufficient remedy, and an appeal is a much

wider and more effective remedy than a right of making a representation."

(Emphasis supplied)

22. Thus, from what is discussed above, it is clear that the provisions of Regulation 13 cannot be said to be comparable with the exceptions provided in Article 311(2), excluding only one category of security risk. Besides, as explained by the Constitutional Bench in Tulsiram Patel's case (supra) even in cases under Article 311(2), normally there is an opportunity to file an Appeal under the Rules traceable to Article 309. Orders passed by the President or the Governor are undoubtedly made an exception since there cannot be any high Authority to which an Appeal would lie. But the Board of Directors of a Company cannot be equated with the President or the Governor to deny any further remedy. There should be at-least a provision for a review, if not an Appeal, if the decision is taken by the Board of Directors. Under the present regulations, there is no opportunity to an employee either before or after termination. Merely because it is a high Authority the decision of the Board of Directors cannot be placed beyond any internal mechanism of correction. The relevant rule undoubtedly suffers

from this vice. For these reasons, we cannot but hold that Regulation 13 of Indian Airlines Employees (Flying Crew) Service Regulations, 1990, is ultra vires Article 14 of the Constitution of India. It is high time they amend it appropriately.

23. The law on this issue as laid down by majority of four versus one in Delhi Transport Corporation (supra) is reiterated in para-15 of Uptron India Ltd. (supra) which reads as follows:-

> " 15. Conferment of "permanent" status on an employee guarantees security of tenure. It is now well settled that the services of a permanent employee, whether employed by the Government, or government company or government instrumentality or statutory corporations or any other "authority" within the meaning of Article 12, cannot be terminated abruptly and arbitrarily, either by giving him a month’s or three months’, notice or pay in lieu thereof or even without notice, notwithstanding that there may be a stipulation to that effect either in the contract of service or in

the Certified Standing Orders. "

24. It is clear from what is stated above that the petitioner has not been afforded any opportunity either before or after termination and since the rule under which the action is taken against her is held to be bad in law, obviously the termination will have to be set aside. Therefore, comes the question of relief. Mr.Cama has pressed for reinstatement with full back wages whereas Mr.Talsania has submitted that in the event the termination being held bad, appropriate compensation would be a proper relief. We have considered the submissions anxiously on the background of the facts of the case. When it comes to relief, it is not necessary that in every case there should be an order of reinstatement and in appropriate cases compensation can be awarded in lieu thereof. In **S.K. Verma vs. Central Government Industrial Tribunal reported in AIR 1981 S.C. 422**, the Court was concerned with the question of relief to a bank employee in a case under the Industrial Law. The Apex Court did hold that ordinarily if the termination of the services of workmen is bad, it must lead to reinstatement and back wages. Thereafter, the Apex Court added in paragraph 6 thereof as follows:-

> " But there may be exceptional circumstances which make it **impossible or wholly inequitable vis-a-vis the employer and workmen to direct reinstatement.** The industry might have closed down or might be in severe financial doldrums, the workmen concerned might have secured better or other employment elsewhere and so on. In such situation, there is a vestige or discretion left in the Court to make appropriate consequential orders. "
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> (Emphasis supplied)

In **O.P. Bhandari vs. Indian Tourism Development Corpn. Ltd. & ors. reported in (1986) 4 Supreme Court Cases 337** = **(1986) 4 SCC 337**, the Apex Court noted that in the case of managerial cadre it is in public interest that the Board of Directors of the Undertaking are not compelled to entrust their management to personnel in whom, on reasonable ground, they have no faith or trust (paragraphs 6 and 7 of the judgment). Again with respect to back wages, the Apex Court has held in **Hindustan Tin Water Pvt. Ltd. vs. Employees (AIR 1979 S.C. 75)** that although full back wages would be the normal rule, there cannot be a straight jacket

formula on back wages. In the case of **O.P. Bhandari (supra)**, the Apex Court did hold Rule 31 of Indian Tourism Development Corporation (Conduct, Discipline and Appeal) Rules, 1978, providing for termination by simple notice as violative of Articles 14 and 16(1) of the Constitution of India. It held the termination of appellant to be bad in law but it also noted that the actions of appellant, who was a Manager in a hotel of respondent, were opposed by a Trade Union of employees. In view of the gravity of the grievances against the appellant, the Apex Court held that it was a fit case to grant compensation in lieu of reinstatement. It awarded 3.33 years' salary including allowances on the basis of the last pay in lieu of the reinstatement. This was on the footing that his superannuation was more than 8 years away. It is, however, to be noted that the Court granted it considering the then prevailing rate of interest of 15%. This was to give 50% of the annual salary to the petitioner which he will get without working and he could work some-where else and earn for the remaining 50%. This compensation was apart from back wages and provident fund and other retirement benefits. In a Review Petition, however, it was clarified by the Apex Court that the appellant was not entitled

to arrears of salary under the earlier order (see para-7 of O.P. Bhandari vs. I.T.D.C. AIR 1994 SC 1294).

25. We have noted the relevant judgments. We have to note that the incident leading to termination is not denied by the petitioner, she had accepted the guilt at-least initially and the criminal trial is still pending. Considering that the serious allegations are found worthy of acceptance by the Board of Directors, we do not think that we should compel the Board of Directors to reinstate such an employee in whom they have obviously lost confidence. She will, however, have to be compensated monetarily. By now, the rates of interest have gone down considerably and nearly to half of what is mentioned in O.P. Bhandari's case (supra). This being so, if the petitioner is to be adequately compensated, we direct that she be paid six years' salary towards both back wages as well as for loss of employment in future. This will be on the basis of her last drawn basic pay and dearness allowance. Respondents will pay the petitioner the amount refunded by her towards the provident fund and gratuity also with interest at the rate provided under the Statutes governing them. This should be

the appropriate compensation for the termination of her services and loss of employment considering that she has about 10 years of service hereafter. This is because in view of the nature of allegations against her, it would not be advisable to reinstate the petitioner in whom the employer has obviously lost confidence. The Indian Airlines is entitled to say that it does not require such persons with doubtful integrity. At the same time, since the termination is not justified by any provisions of law, the petitioner will have to be compensated reasonably which we direct to be compensated as above. We direct the respondents to complete the calculations and make the payment within four weeks and in any case, by end of September 2005.

26. In the circumstances, Rule is made partly absolute though without any order as to costs.

(H.L. GOKHALE, J.)

(S.C.DHARMADHIKARI, J.)